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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN DEWITT McDOWELL, Defendant and Appellant.	E046920 (Super.Ct.No. RIF141332) OPINION

APPEAL from the Superior Court of Riverside County. Ronald Johnson, Judge. Affirmed with directions.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf, Susan Miller and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

1. Introduction[1]

A jury convicted defendant Jonathan Dewitt McDowell of two criminal offenses committed on November 7, 2007: one count of selling cocaine base with the intent to promote a criminal street gang (Health & Saf. Code, § 11352, subd. (a); § 186.22, subd. (b)); and one count of active participation in a criminal street gang. (§ 186.22, subd. (a).) The court sentenced defendant to a total prison term of six years eight months.[2]

On appeal, defendant challenges his conviction on count 1 for the omission of a unanimity instruction. On count 2, he protests the court's failure to define expressly the meaning of the phrase "felonious criminal conduct" as used in CALCRIM No. 1400. Defendant also contends defendant's eight-month sentence for the street gang conviction on count 2 should be stayed under section 654. We accept the latter contention and order defendant's sentence modified. Otherwise, we affirm the judgment.

2. The Trial

Brian Traverso, a special agent with the Bureau of Alcohol, Tobacco, and Firearms, testified he was working on a drug-buy program involving a location in Moreno Valley. Traverso was managing an undercover informant, Andrew Green, a former drug dealer. Green was supposed to effect a controlled buy of rock cocaine at Elm Court. Traverso conducted a thorough search of Green's person and vehicle before

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[1] All statutory references are to the Penal Code unless stated otherwise.

[2] The sentence consisted of the middle term of four years on count 1 plus two years for the enhancement and eight months on count 2.

the buy. When the buy was completed, Green delivered the purchased contraband to the deputies. Green was paid and Traverso searched him again before he departed the scene.

Green testified that, when he made the buy, he approached a black man, the defendant, and two black women, sitting under a carport, and asked for a "dub," which is $20 worth of cocaine base or crack cocaine. Defendant directed Green to his sister, one of the women, who gave Green "$20 worth of rock."

The jury listened to a tape recording of Green's encounter with defendant and his sister. Photographs also documented the encounter. The rock cocaine purchased by Green weighed .3 grams.

Marc Bender, a police drug expert, testified that it is common for a drug dealer to use another person, a woman or juvenile, to keep possession of drugs for sale. The amount of cocaine was about six doses. In Bender's opinion, defendant and his sister were dealing drugs.

Earlier that day, a known gang member, Chris Thomas, had approached defendant and received something by hand. Other drug sales appeared to be occurring after Green made the controlled buy and again on November 27, 2007.

Walter Mendez, a gang expert, testified that a Moreno Valley criminal street gang was called "Sex Cash Money." Mendez observed Green making the drug buy from defendant and his sister.

Another gang expert, George Reyes, testified that Sex Cash Money—and a related smaller clique, Unknown Mafia—was a criminal street gang which committed various crimes, including murder, manslaughter, burglary, assault, firearm possession, and drug

offenses. Defendant used the gang moniker, "Scrappy." A tattoo on his back was "unknown" for Unknown Mafia. Defendant corresponded from jail with gang members. He was a leader in Sex Cash Money and a member of the Unknown Mafia. Reyes further opined that defendant sold drugs to benefit himself and his gang.

3. Unanimity Instruction

Defendant first contends his conviction on count 1 for selling cocaine base should be reversed because there were two purported sales on November 7, 2007: "In a criminal case, a jury verdict must be unanimous. [Citations.] . . . Additionally, the jury must agree unanimously the defendant is guilty of a *specific* crime. [Citation.] Therefore, cases have long held that when the evidence suggests more than one discrete crime, either the prosecution must elect among the crimes or the court must require the jury to agree on the same criminal act. [Citations.]" (*People v. Russo* (2001) 25 Cal.4th 1124, 1132; *People v. Davis* (2005) 36 Cal.4th 510, 560-561.)

In a prosecution for sale of narcotics "based upon two or more individual units of contraband reasonably distinguishable by a separation in time and/or space," absent an election by the People, an instruction must be given to assure jury unanimity. (*People v. King* (1991) 231 Cal.App.3d 493, 501; *People v. Davis, supra,* 36 Cal.4th at p. 560.) According to defendant, the prosecution argued defendant sold drugs both to Green and to Thomas and failed to make an election between the two sales.

We disagree with defendant's characterization of the prosecutor's argument. In his opening statement, the prosecutor referred specifically and exclusively to the drug sale between defendant, his sister, and Green. The trial testimony focused primarily on

the controlled buy made by Green, not the more ambiguous transaction between defendant and Thomas. In closing argument, the prosecutor explained defendant was guilty on a theory of aiding and abetting based entirely on the episode with his sister and Green. To the extent, the prosecutor mentioned the exchange with Thomas, it was offered as an example of defendant being generally engaged in drug dealing. Defense counsel also addressed only the sale to Green in his closing argument. Based on the foregoing, there was an election by the prosecution to rely on the sale to Green. (*People v. Russo, supra*, 25 Cal.4th at p. 1132.) No reasonable juror would have convicted defendant on a sale to Thomas instead of Green.

Even so, there was no need for a unanimity instruction because defendant was engaged in a continuing course of conduct selling drugs. (*People v. Maury* (2003) 30 Cal.4th 342, 423; *People v. Harris* (1994) 9 Cal.4th 407, 431, fn. 14, citing *People v. Stankewitz* (1990) 51 Cal.3d 72, 100; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1198.) Furthermore, any error was harmless where a jury must have resolved the basic credibility dispute against defendant and would have convicted him of any offense shown by the evidence. (*People v. Jones* (1990) 51 Cal.3d 294, 307; *People v. Coelho* (2001) 89 Cal.App.4th 861, 882-883; *People v. Thompson* (1995) 36 Cal.App.4th 843, 852-853.)

4. Felonious Criminal Conduct

With regard to count 2, the trial court gave a jury instruction based on CALCRIM No. 1400, concerning active participation in a criminal street gang (§ 186.22, subd. (a)): "To prove that the defendant is guilty of this crime, the People must prove that: [¶] . . . [¶] The defendant willfully assisted, furthered, or promoted felonious criminal conduct

by members of the gang either by directly and actively committing a felony offense, or aiding and abetting a felony offense." But, in giving oral instruction to the jury, the trial court omitted the language "Felonious criminal conduct means committing or attempting to commit any of the following crimes: . . ."

Both parties agree the trial court erred by not instructing the jury that, in relation to the street gang participation charge, CALCRIM No. 1400 required the jury to find that defendant furthered, assisted, or promoted the target felony offense of selling cocaine base in violation of Health and Safety Code section 11352, subdivision (a). (*People v. Hughes* (2002) 27 Cal.4th 287, 348-349.) Defendant contends the phrase "felonious criminal conduct" is a technical term requiring definition. (*People v. Lamas* (2007) 42 Cal.4th 516, 524-525; *People v. Failla* (1966) 64 Cal.2d 560, 564-566.) Defendant speculates rather wildly about how the jury might have misinterpreted his own bad behavior to be felonious criminal conduct. The People counter that the omission was harmless error and did not require reversal.

Defendant's reliance on *Lamas* is misplaced because that case involved a misdemeanor, which could not have qualified as felonious criminal conduct. The present case involves the felony offense of selling cocaine. (Health & Saf. Code, § 11352, subd. (a).) The jury was not wrongly instructed that defendant could be found to be an active member of a criminal street gang based on misdemeanor conduct.

We agree with respondent that reversal is not required because the jury was properly instructed with all the elements of the crime of active participation in a criminal street gang. The jury convicted defendant of only one crime, the felony offense of selling

cocaine. (Health & Saf. Code, § 11352, subd. (a).) No misdemeanor offense was argued or considered. For that reason, under any standard of review, the error was harmless because it was not reasonably probable defendant could have achieved a more favorable result. (*People v. Breverman* (1998) 19 Cal.4th 142, 149.)

5. Section 654

Finally, defendant argues his sentence violated section 654 because the trial court sentenced him to consecutive terms for the gang enhancement on count 1 and the street terrorism charge on count 2 when the court should have stayed the latter sentence.

Recently this issue has been thoroughly addressed by this court in *People v. Sanchez* (2009) 179 Cal.App.4th 709, 720-729 [4th Dist., Div. 2]. *Sanchez* rejected *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1467-1468, in which the jury found the Herrera defendant guilty of attempted murder with a gang enhancement allegation. The jury also found the defendant guilty of the gang crime of section 186.22, subdivision (a). The trial court imposed a sentence for attempted murder with the gang enhancement and also imposed a separate sentence for the gang crime. (*People v. Herrera*, *supra*, at p. 1462.)

In *Sanchez*, defendant was found guilty of two counts of second degree robbery without gang enhancements and one count of street terrorism. (*People v. Sanchez*, *supra*, 179 Cal.App.4th at p. 713.) The court commented: "For there to be a section 654 issue at all, the defendant must be found guilty of both gang participation and the underlying felony. And to be found guilty of gang participation, the defendant must *either* personally commit the underlying felony, or '*willfully* promote[], further[], or assist[]' the

underlying felony. (Pen. Code, § 186.22, subd. (a).) Thus, *if* the defendant is also found guilty of the underlying offense, the defendant's intent and objective in committing both offenses must be the same." (*People v. Sanchez, supra,* at p. 727.)

In *Sanchez*, "the underlying robberies were the act that transformed mere gang membership—which, by itself, is not a crime—into the crime of gang participation. Accordingly, it makes no sense to say that defendant had a different intent and objective in committing the crime of gang participation than he did in committing the robberies. Gang participation merely requires that the defendant 'willfully promote[d], further[ed], or assist[ed] in any felonious criminal conduct by members of that gang . . . .' (Pen. Code, § 186.22, subd. (a).) It does not require that the defendant participated in the underlying felony with the intent to benefit the gang. [Citations.]" (*People v. Sanchez, supra,* 179 Cal.App.4th at pp. 727-728.)

The reasoning of *Sanchez* applies with equal force here. Defendant "stands convicted of both (1) a crime that requires, as one of its elements, the intentional commission of an underlying offense, and (2) the underlying offense itself. Thus, the most analogous line of cases involves convictions for both felony murder and the underlying felony. It has long been held that section 654 bars multiple punishment under these circumstances. [Citations.] The logic is that the underlying felony 'is a statutorily defined element of the crime of felony murder' [citation], and thus the underlying felony is 'the same act which made the killing first degree murder.' [Citation.]" (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 728.)

Here, the only way the jury could have found defendant guilty of gang participation was by finding that he committed the underlying felony of selling cocaine base to promote a street gang. The crucial fact is that selling cocaine was necessary to satisfy an element of the gang participation charge. Accordingly, almost by definition, defendant had to have the same intent and objective in committing his two crimes. (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 729.)

We therefore conclude that, given the sentence for the selling cocaine to promote a street gang, defendant could not be punished separately for gang participation. (*People v. Sanchez, supra,* 179 Cal.App.4th at p. 729.)

6. Disposition

We affirm the judgment as modified. The eight months imposed for count 2 is hereby stayed. The stay shall become final if and when defendant has served the remainder of his sentence. The trial court is directed to prepare an amended abstract of judgment and to forward certified copies of it to the Department of Corrections and Rehabilitation.

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s/Gaut
J.

We concur:

s/Richli
Acting P. J.

s/Miller
J.